NO. 49053-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SUSAN E. KRAMER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 15-1-02053-8

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does the defendant demonstrate that the prosecutor's remarks were improper?

2. Did the prosecutor vouch for the credibility of a witness?

3. Did the prosecutor impugn the integrity of defense counsel?

4. Were the prosecutors remarks, made in rebuttal, a fair response to arguments made by defense counsel?

5. Did the defendant waive the issue of improper closing argument where defense counsel failed to object to the remarks at trial?

6. Does the defendant demonstrate that the prosecutor's remarks were flagrant, ill-intentioned, and incurable by the court's instruction?

7. If improper, does the defendant show that the remark resulted in prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On May 27, 2015, the Pierce County Prosecuting Attorney (State) charged the defendant, Susan Kramer, with one count of unlawful possession of a controlled substance (UPCS), methamphetamine. CP 1. The defendant filed a motion to suppress the evidence. CP 3-6.

The case was assigned to the Hon. Bryan Chushcoff for trial. 1 RP 4. Before jury trial began, the court heard evidence in a suppression hearing pursuant to CrR 3.6. *See* RP vol. 1. The court denied the motion. 1 RP 153, CP 71-74. The matter proceeded to trial.

After hearing all the evidence, the jury found the defendant guilty, as charged. CP 51. On June 10, 2015, the court sentenced the defendant as a first-time offender; to three days in custody, with credit for the three days she had already spent in jail. CP 60. The defendant filed a timely notice of appeal on the same day. CP 75.

2. Facts

On February 15, 2015, DuPont Police Officer Goss was working the night shift. 4 RP 212. He was dispatched to check on a vehicle and persons suspected of prowling cars in an apartment complex. 4 RP 213. Officer Goss did not see the described vehicle at the apartment complex.

As he continued to drive in the area, he saw a van matching the description in the dispatch. The van was driving behind a closed business. 4 RP 213. Officer Goss stopped the van on a street close to Interstate-5. 4 RP 215. Officer Goss contacted the defendant, who was the driver. *Id.* There was a male reclining in the passenger seat. *Id.*

The male was evasive about his identity. 4 RP 218. Officer Goss eventually learned that the man had a bench warrant as a fugitive out of Utah. 4 RP 221.

Officer Goss spoke with the defendant. She said that she owned the van. 4 RP 223. She consented to a search of the van. 4 RP 224. In the van, Officer Goss found a purse which contained a small bag of methamphetamine and a glass pipe for smoking the drug. 4 RP 231, 233. The drug and the pipe were found in the same zippered pouch in the purse. 4 RP 234. A second drug pipe was discovered in a basket of men's clothing. 4 RP 235.

C. ARGUMENT.

1. THE REBUTTAL CLOSING ARGUMENT BY THE PROSECUTING ATTORNEY WAS PROPER.

a. The defendant waived this issue where he failed to object below.

The defendant bears the burden of showing that the comments in closing argument were improper and prejudicial. ***State v. Warren***, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). At trial, defense counsel has a duty to object to improper remarks and to seek a remedy from the court. *See* ***State v. Emery***, 174 Wn.2d 741, 761-762, 278 P.3d 653 (2012). If the defendant fails to object, he waives the issue of misconduct unless the comments are so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. ***State v. Thorgerson***, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). The defendant must show that the prejudice had a substantial likelihood of affecting the verdict. ***Emery***, 174 Wn.2d at 760-761. "The

criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Id.*, at 762, quoting ***Slattery v. City of Seattle***, 169 Wash. 144, 148, 13 P.2d 464 (1932).

A prosecutor's comments during closing argument is reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). The appellate court presumes the jury follows the trial court's instructions. ***State v. Anderson***, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009). In evaluating whether prejudice has occurred, a court must examine the context in which the statements were made, including defense counsel's argument. Therefore, defense counsel's conduct, as well as the prosecutor's response, is relevant. ***State v. Ramirez***, 49 Wn. App. 332, 337, 742 P.2d 726 (1987).

The jury was properly instructed regarding credibility and the evidence. The State was arguing in the context of, and referring to, the instructions. If the defendant thought that the prosecutor was straying from the instructions, he could have asked the court to remind or re-instruct the jury. *See* ***Warren***, *supra*. She did not. She has waived the issue on appeal.

b. The defendant fails to show that the prosecutor's remarks, made in rebuttal, were improper.

In rebuttal, a prosecutor is entitled to make a fair response to the arguments of defense counsel. ***State v. Brown***, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). Even improper remarks by the prosecutor are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to defense counsel's argument, unless the remarks are not a pertinent reply or are so prejudicial that a jury instruction would be ineffective. ***State v. Russell***, 125 Wn.2d 24, 86, 882 P. 2d 747 (1994).

Even if improper, a prosecutor's remarks that are in direct response to a defense argument are not grounds for reversal as long as the remarks do not "go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record, or be so prejudicial that an instruction cannot cure them." ***State v. Dykstra***, 127 Wn. App. 1, 8, 110 P.3d 758 (2005).

i. The prosecutor did not impugn or disparage defense counsel.

A prosecutor may not impugn the role or integrity of defense counsel. *See* ***State v. Lindsay***, 180 Wn.2d 423, 326 P. 3d 125 (2014). In ***Lindsay***, the unprofessional behavior permeated the entire trial. *Id.*, at 432, 444. But it was the prosecutor's behavior in closing that sent the case over the edge. *Id.*, at 443-444. The Court was so offended by the behavior of both the defense and prosecutor that it took the unusual step of naming

them in the opinion, no doubt so that this ignominy could follow them the remainder of their professional lives. *Id.*, at 428.

In ***State v. Reed***, 102 Wn.2d 140, 145, 684 P.2d 699 (1984), the trial was polluted by numerous remarks by elected prosecutor in rural Pacific County. In addition to calling the defendant a liar several times and advocating re-enacting the death penalty for the defendant, the prosecutor tried to fire up the home-town jury by arguing: "Are you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?" *Id.*, at 143. The Court was so taken aback by the arguments, it compared the trial to Camus' "The Stranger". *Id.*, at 146. These were egregious cases.

Here, because Officer Goss was the State's principal witness, defense counsel spent much of his argument finding fault with Goss' work. Early on, counsel pointed to lack of documenting details. 5 RP 452. Counsel went on to point out inconsistencies in Goss' testimony and some of the photographs. 5 RP 457-458. Counsel generally criticized Goss' investigation as incomplete and inaccurate. 5 RP 460-462. Much of this was certainly to be expected given the nature of this case.

In reply to the defense argument, the prosecutor said:

> Defense wants you to put yourself in the position of the officer and say, you should have done this. You should have done that. You should have done this. You should have done this. They don't talk about the fact that the officer followed protocol. Why? To confuse you. To take your attention away from Ms. Kramer, from her behavior,

> and to blame other people. It is clear, blaming the cop, sworn officer, blaming a passenger. None of this falls on the defendant, they said. She is innocent.

5 RP 470. The prosecutor properly used a jigsaw puzzle analogy to describe evidence in a trial[1]:

> Because during the course of this trial, ladies and gentlemen, what the State did for you was -- this case is like a puzzle. What the State did, by putting on witnesses by making arguments, is to put puzzle pieces together so you can better see what happened in this case.

5 RP 469.

Here, unlike ***State v. Reed***, for example, the prosecutor did not accuse any person of lying, did not state that defense counsel lacked a valid case, did not categorize or stereotype the defendant, and did not make statements demeaning the credibility of any witness.

Both attorneys were, perhaps, overly free in their descriptive language. Defense counsel was a little over the top in accusing Officer Goss more than once of "selective amnesia." The prosecutor ought better have merely warned the jury not to be confused, instead of saying who was doing the confusing. Viewed in context, the prosecutor's comment was a specific response to defense counsel's arguments and did not malign the role of defense counsel in general or disparage defense counsel personally. Rather, the prosecutor argued that the jury should focus on the

[1] ***Lindsay***, 180 Wn.2d at 435-436.

evidence, and not be confused by defense counsel's arguments. Under the circumstances, the comment was not improper.

Moreover, even if the comments could be construed to reflect negatively on defense counsel personally, any potential prejudice could have been neutralized by a curative instruction or a reminder of the applicable instruction already given, such as Instruction 1[2] (CP38). The fact that trial defense counsel did not object strongly suggests he considered the now-challenged comments as a fair reply. *See* ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

ii. The prosecutor properly argued the credibility of the witnesses.

In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. ***State v. Hoffman***, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991). But, a prosecutor may not personally endorse, or vouch for a witness. *See* ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); ***State v. Jackson***, 150 Wn. App. 877, 883, 209 P. 3d 553 (2009). Vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the

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[2] "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. ... You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 38.

prosecutor indicates that evidence not presented at trial supports the witness's testimony; e.g. the prosecutor suggests or states that the prosecutor knows additional information that the jury did not hear. *See* ***State v. Ish***, 170 Wn.2d 189, 196, 241 P. 3d 389 (2010). The reviewing court will not find prejudicial error "unless it is 'clear and unmistakable' that the prosecutor is expressing a personal opinion." ***Brett***, 126 Wn.2d at 175.

In the present case, a police officer discovered methamphetamine in a traffic stop involving one van occupied by two people. The primary evidence was the testimony of the discovering officer, Goss. The defense was denial. The defendant testified that the drug and the pipes were not hers; she knew nothing about it. The defense did not call the passenger, Mr. Ferrall, but laid the blame on him.

In his closing argument, defense counsel attacked the credibility of Officer Goss. Counsel argued that Goss had "selective amnesia." 5 RP 452, 457. Counsel implied that Officer Goss had done a poor job recording the events in his report. 5 RP 458. Counsel argued that Officer Goss could not have heard or seen some of the things he testified to. 5 RP 460-461. Counsel criticized Officer Goss' lack of experience:

> Just because he is an officer -- I asked that in voir dire, is anyone going to give an officer who comes in dress blues more credibility? He doesn't deserve it. Two-and-a-half years. He didn't have a lot of experience, not a lot of

experience, and it's exhibited in his faulty memory, his limited report, and his inconsistent statements with the video.

Counsel went on to say:

Once again, you evaluate Goss' testimony as a whole. You may think these are little things, but these little things as far as Goss is concerned just add up to no credibility because why would you say that you learned something when this video that shows that you weren't even near there. He wanted to bolster himself, his position on the stand, his testimony. That's what it is all about. We don't bolster egos. That's not what this is about. It is very important that his testimony be recalled because his answers were not necessarily consistent with the video, they weren't consistent with Feleppa, or he couldn't remember.

5 RP 467.

In rebuttal, the prosecutor replied to this attack on Officer Goss:

What does the officer have to gain or lose to tell you what he told you? Counsel says here, he doesn't deserve the trust because he is only being caught for two and a half years. This man has sworn an oath of office to protect and serve, gone through training, gone through field training, is now been trusted to be on his own.

The jury was correctly instructed regarding factors to consider in evaluating testimony and evidence[3]. CP 38. Both attorneys used these factors in arguing credibility of the witnesses, especially Officer Goss and the defendant. In rebuttal, the prosecutor properly argued that Officer Goss had no "bias or prejudice." He also responded to a specific attack or criticism by defense counsel.

The prosecutor did not vouch for the witness' credibility. In context, the prosecutor argued the credibility of the witness and the strength of the State's case. He outlined which evidence (and reasonable inferences from the evidence) could support the jury's conclusion that Officer Goss was credible. Nowhere did the prosecutor express his personal opinion regarding a witness' credibility. This is not vouching.

2. IF THE STATE PREVAILS ON APPEAL, THE COURT OF APPEALS MAY EXERCISE ITS DISCRETION IN AWARDING COSTS.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. ***State v. Blank***,

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[3] Instruction 1 stated, in part:
You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testified about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony. CP 38.

131 Wn.2d 230, 234, 930 P.2d 1213 (1997); ***State v. Mahone***, 98 Wn. App. 342, 989 P. 2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000); ***State v. Sinclair***, 192 Wn. App. 380, 367 P. 3d 612 (2016).

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In ***Blank***, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

By enacting RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.73.160 was enacted in 1995. The Legislature has amended the statute somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, *see e.g.* ***State v. Blazina***, 182 Wn.2d 827, 344 P.3d 680 (2015), the Legislature has yet to show any sympathy.

In the present case, the defendant was convicted of UPCS. She received a minimal sentence. The court sentenced her to three days, with credit for the three days she had already served. CP 60. The defendant is a 56 year old able bodied woman. She had employment history before going to trial. At the sentencing hearing, the trial court specifically inquired regarding the defendant's ability to pay legal financial obligations.

6/10/2016 RP 7. The defendant had employment history as a casino worker. *Id.*, at 11. The defendant had recently completed education for an Associate's degree with the goal to work as a medical administrative assistant. *Id.*, at 8. Should the State prevail in this case, this Court should consider the both the facts of this case and the intent of the Legislature in exercising its discretion regarding appellate costs.

D. CONCLUSION.

The prosecutor's remarks in rebuttal closing were a fair response to those of defense counsel. The remarks were also proper argument regarding the evidence. There was neither error by the court nor misconduct by the prosecutor in this case. The State respectfully requests that the judgment be affirmed.

DATED: FEBRUARY 14, 2017

MARK LINDQUIST
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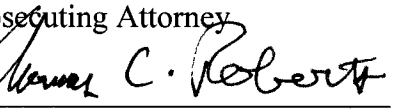

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